PALMERSTON HOLDINGS SDN BHD

v.

SULASTRI MOHD HOESSEIN ENAS

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[SUIT NO: 22-168 TAHUN 2002]
30 NOVEMBER 2005

CONTRACT: *Specific Performance - Sale and purchase agreement - Criteria for specific performance to be granted - Issue of laches as a defence/triable issue - Section 20(1)(a) of the Specific Relief Act 1950 - Relief of specific performance not provided contractually*

Vide a Sale and Purchase Agreement ("SPA") and a Deed of Mutual Covenants both dated 20 December 1996 (collectively referred to as "said agreement"), executed between the plaintiff and the defendant, the defendant purchased from the plaintiff an apartment unit known as Unit No. 31-02a Block 3, Seaview Tower, Ocean Palms, Klebang Besar, Malacca for the purchase price of RM730,050.

Pursuant to the said agreement, the defendant paid to the plaintiff RM72,986.10 and thereafter defaulted on her obligations thereunder.

The plaintiff through their solicitors sent off many letters to the defendant, the contents of all of which were never disputed by the defendant.

The plaintiff applied by way of summons in chambers (encl. 8) for summary judgment for specific performance under O. 81 r. 1(1)(a) of the Rules of the High Court 1980 against the defendant.

The plaintiff only took out a writ seeking specific performance as aforesaid after a lapse of five years and 11 months from completion of the apartment.

Issues:

a) Whether the defence of laches applies to the granting by the courts of specific performance; and

b) Whether upon a construction of cl. 9 of the SPA, the plaintiff is entitled to rely on the remedy of specific performance as opposed to and/or in addition monetary compensation.

Held:

[1] The doctrine of *laches* in the court of equity is not an arbitrary or technical doctrine and the discretion is founded on the principle that there may be circumstances when it would be practically unjust to give a remedy of specific performance eg. either because a party has by his conduct done that which might be fairly be regarded as a waiver or put the other party in a situation in which it would be unreasonable to place him if the remedy were afterwards to be asserted - *M. Ratnavale* and *Saad Marwi*. (p. 426 g-h)

[2] The aforesaid delay of five years and 11 months occasioned by the plaintiff in filing this action for specific performance would in my view entitle the defendant to raise the defence of *laches* as a triable defence which would be sufficient to preclude the plaintiff from obtaining summary judgment under O. 81 RHC. (p. 427 b)

[3] The fundamental principles governing the granting or refusal of specific performance are as set out in the the case of *M Ratnavale* and they are basically that specific performance is an equitable remedy which is special and extraordinary in its character, that the court's power to grant it are not arbitrary or capricious but rather a discretionary power which is to be exercised on fixed principles and that the conduct of the plaintiff such as delay or laches may render it inequitable to grant the remedy. (p. 426 c-e)

[4] The facts demonstrate to me that the defendant has no intention of proceeding with the completion of the said agreement, therefore the rights and obligations of the parties are to be determined by reference to the said agreement. A perusal of the SPA shows no provision for the remedy of specific performance in the event of default of breach by the defendant. (p. 427 h)

[5] As the remedy of specific performance has been omitted or in any event has not been spelt out in the SPA, the plaintiff's right to it is a triable or arguable issue and so the plaintiff's entitlement to the remedy of specific performance by way of summary judgement is not plain and obvious. The plaintiff's remedy, if any, having considered s. 20(1)(a) of the Specific Relief Act 1950 appears to be monetary in nature and that too subject to a reading of cl. 9 of the SPA. (p. 429 b-d)

[6] In the circumstances, the plaintiff's application under O. 81 RHC is dismissed with costs and the matter is ordered to proceed to trial. (p. 429 h)

Case(s) referred to:
Arab Malaysian Corp Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd [1998] 2 CLJ Supp 169 HC ***(refd)***
Emile Erlanger & Ors v. New Sombrero Phosphate Co & Ors [1878] 3 App Cas 1218 ***(refd)***
Ismail Mohd Yunos & Anor v. First Revenue Sdn Bhd [2000] 5 MLJ 42 HC ***(refd)***
Lindsay Petroleum Co v. Hurd [1874] LR 5 PC ***(refd)***
M Ratnavale v. S Lourdenadin [1988] 2 MLJ 371 SC ***(refd)***
Saad Marwi v. Chan Hwan Hua & Anor [2001] 3 CLJ 98 CA ***(refd)***
Wong Hon Leong David v. Noorazman Adnan [1995] 3 MLJ 283 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 81 r. 1(1)(a), O. 34
Specific Relief Act 1950, s. 20(1)(a)

For the plaintiff - Yoong How Vey; M/s Chee Siah Le Kee & Partners
For the defendant - Ahmad Syam Che Kub; M/s Zain Megat & Murad

Reported by Sharmini Pillai

JUDGMENT

Low Hop Bing J:

Application
This is the plaintiff's application by way of summons in chambers in encl. (8) for summary judgment ie, specific performance against the defendant under O. 81 r. 1(1)(a) of the Rules of the High Court 1980.

Factual Background
The plaintiff and the defendant have on 20 December 1996 executed a sale and purchase agreement under Schedule H to the Housing Developers (Control and Licensing) Regulations 1989 and a deed of mutual covenant (both collectively referred to as "the agreements") for one unit of apartment known as Unit No. 31-02, Block 3, Seaview Tower, Ocean Palms, Klebang Besar Melaka ("the apartment") at a consideration of RM730,050.

Pursuant to the agreements, the defendant has paid the plaintiff a sum of RM72,986.10.

The plaintiff's claim against the defendant is for specific performance of the agreements and also for the sum of RM1,069,920.06 allegedly due as at 31 July 2002.

Laches

Mr. Ahmad Syam bin Che Kub learned counsel for the defendant raised the defence of laches as the apartment was completed on 1 November 1996 and the writ praying for the remedy of specific performance was filed on 9 October 2002, after a lapse of five years and 11 months. Support was sought in *M. Ratnavale v. S. Lourdenadin* [1988] 2 MLJ 371 SC; and *Saad Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ 98.

Plaintiff's learned counsel Mr. Yoong How Vey took the stand that this defence was taken by the defendant as an afterthought.

I shall first consider the authorities cited for the defendant.

In *M. Ratnavale, supra*, one of the issues for determination was whether the defence of *laches* applied to the granting of specific performance. The plaintiff did not seek specific performance under O. 81. The matter went on for trial. By implication, the defence of laches was a triable defence there. In the judgment delivered for the then Supreme Court, Hashim Yeop A Sani SCJ (later CJ(M)) at p. 377 C-G right column set out the following fundamental principles governing the grant or refusal of specific performance:

1. The power of the court to grant specific performance is not arbitrary or capricious but discretionary which is to be exercised on fixed principles;

2. Specific performance is an equitable remedy which is special and exraordinary in its character; and

3. The conduct of the plaintiff such as delay or *laches* may render it inequitable to grant the remedy.

In relation to the doctrine of *laches*, at p. 378A left to C right, his Lordship referred to *Lindsay Petroleum Co. v. Hurd* [1874] L.R. 5 P.C.; and *Emile Erlanger & Ors. v. New Sombrero Phosphate Co. & Ors.* [1878] 3 App. Cas. 1218 and added:

4. The doctrine of *laches* in the court of equity is not an arbitrary or technical doctrine;

5. The discretion is founded on the principle that there may be circumstances when it would be practically unjust to give a remedy of specific performance eg either because the party has by his conduct:

   5.1 done that which might fairly be regarded as a waiver; or

   5.2 put the other party in a situation in which it would be unreasonable to place him if the remedy were afterwards to be asserted.

The above principles on *laches* as enunciated in *M. Ratnavale, supra*, were followed by the Court of Appeal in a judgment delivered by Gopal Sri Ram JCA in *Saad Marwi, supra,* in which the equitable defence of laches was raised.

Reverting to the facts of this case, I am of the view that the aforesaid delay of five years and 11 months occasioned by the plaintiff would entitle the defendant to raise the defence of *laches* as a triable defence which would be sufficient to preclude the plaintiff from obtaining summary judgment under O. 81.

Defendant's Admission Of Plaintiff's Claim

It was submitted for the plaintiff that the defendant has never replied to or disputed the letters dated 17 January 1997, 11 March 1997, 14 January 1998, 4 February 1998, 15 May 1998, 27 July 1998, 30 August 1999, 26 February 2001 and 30 August 2002 issued by the plaintiff's former and present solicitors, and so any dispute raised by the defendant now must be deemed to be an afterthought which should not be accepted by the court, relying on *Wong Hon Leong David v. Noorazman bin Adnan* [1995] 3 MLJ 283.

It was submitted for the defendant that:

1. under cl. 9 of the sale and purchase agreement, the plaintiff is merely entitled to the remedy of damages, if any, arising from the alleged breach of the sale and purchase agreement; and

2. damages would provide an adequate remedy, relying on s. 20(1)(a) of the Specific Relief Act 1950; *Ismail bin Mohd Yunos & Anor v. First Revenue Sdn Bhd* [2000] 5 MLJ 42 HC; and *Arab Malaysian Corp Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd* [1998] 2 CLJ Supp 169 HC.

Upon a careful consideration of the above submissions, it seems clear to me that apparently the defendant does not dispute all the letters issued by the plaintiff's solicitors to the defendant. Be that as it may, the question before me is whether, on the facts and the law, the plaintiff is entitled to enter summary judgment for specific performance.

The facts do demonstrate that the defendant has no intention of proceeding with the completion of the agreement as the defendant has defaulted in making payments pursuant to the sale and purchase agreement. Therefore, the rights and obligations of the parties are to be determined by reference to the sale and purchase agreement. The sale and purchase agreement which consists of 32 clauses does not appear to provide for the remedy of specific performance in the event of such a default or breach by the defendant.

However cl. 9 does provide, where relevant, as follows:

9. Clause by purchaser and determination of agreement

(1) If the purchaser:

(a) fails to pay any instalments payable under cl. 4(1) in accordance with the third schedule hereto or any part thereof and any interest payable under cl. 8; or

(b) commits any breach of the terms or conditions contained in this agreement or fails to perform or observe all or any of the purchaser's covenants herein contained; or

(c) ...

the vendor may, subject to sub-cl. (2) hereof, annul the sale of the said parcel and forthwith terminate this agreement and in such an event:

(i) the vendor shall be entitled to deal with or otherwise dispose of the said parcel in such manner as the vendor shall see fit as if this agreement had not been entered into;

(ii) the instalments previously paid by the purchaser to the vendor, excluding any interest paid, shall be dealt with and disposed of as follows:

(a) firstly, all interest calculated in accordance with cl. 8 hereof owing and unpaid shall be paid to the vendor;

(b) secondly, an amount to be forfeited by the vendor as follows:

(i) where up to fifty per centum (50%) of the purchase price has been paid, an amount equal to ten per centum (10%) of the purchase price;

(ii) where more than fifty per centum (50%) of the purchase price has been paid, an amount equal to twenty per centum (20%) of the purchase price;

(c) lastly, the residue thereof shall be refunded to the purchaser;

(iii) neither party hereto shall have any further claim against the other for costs damages compensation or otherwise hereunder; and

(iv) each party hereto shall pay its own costs in the matter.

(2) If the purchaser fails to comply with any of the terms of this agreement or if any of such unpaid instalments and interest remain unpaid for any period in excess of twenty-eight (28) days after its due date, the vendor shall give

> the purchaser or his solicitors not less than fourteen (14) days notice in writing by A.R. Registered post to treat this agreement as having been repudiated by the Purchaser and unless in the meanwhile such default and/or breach alleged is rectified or such unpaid instalments and interest are paid, this agreement shall, at the expiration of the said notice, be deemed to be annulled.

As the remedy of specific performance has been omitted or in any event has not been spelt out either in the sale and purchase agreement generally or cl. 9 thereof specifically, the plaintiff's right to specific performance is a triable or arguable issue and so the plaintiff's entitlement to the remedy of specific performance by way of summary judgment is not plain and obvious. The plaintiff's remedy, if any, appears to be monetary in nature, and even this monetary remedy is to be computed by reference to cl. 9 above.

That brings me to the invocation of s. 20(1)(a) of the Specific Relief Act 1950 which merits reproduction as follows:

> 20 Contracts not specifically enforceable
>
> (1) The following contracts cannot be specifically enforced:
>
> (a) a contract for the non-performance of which compensation in money is an adequate relief;

Illustrations of judicial pronouncements in which the remedy of specific performance was excluded in the case where monetary claim provides for an adequate remedy include *Ismail bin Mohd Yunos & Anor, supra*, per Kamalanathan Ratnam J (as he then was) at p. 54C, G referring to *Arab Malaysian Corp Builders Sdn Bhd, supra*, by the same learned judge at p. 145.

Conclusion

On the foregoing grounds, there are two identifiable issues which ought to be tried *viz:*

1. the defence of *laches*; and

2. whether upon the construction of cl. 9 of the sale and purchase agreement, the plaintiff is entitled to the remedy of specific performance?

In the circumstances, I dismiss with costs the plaintiff's application under O. 81, and order that this matter be proceeded to trial.

I also treat this application as a proceeding for case management under O. 34 of the Rules of the High Court 1980 and order the plaintiff's counsel to file on or before 28 March 2006 seven sets of documents as per the list given to the plaintiff's counsel by the court.

Hearing of the suit shall be fixed for 15 September 2006.